No. 13126

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of Joseph E. Allen, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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Basis of Jurisdiction.

This proceeding arose out of and from a voluntary petition in bankruptcy filed in the Southern District of California, Central Division (Bankruptcy Act, Sec. 2(7)). The Bankrupt had an estate in and was in possession—on the date of filing his petition—of the personal property, title to which is claimed by Appellant. The Referee in Bankruptcy (Bankruptcy Act, Secs. 22(a) and 38(3)) found that the Bankrupt was in fact in possession of said personal property upon the date of filing his petition in

bankruptcy and made his Order quieting title to said property in the Trustee in Bankruptcy, Respondent herein (Bankruptcy Act, Sec. (70)). From this Order Appellant filed a petition for review (Bankruptcy Act, Sec. 39(c)) by a judge. The District Court, having affirmed the Referee's Order, the Appellant has now filed an appeal before this Honorable Court (Bankruptcy Act, Sec. 24(a)(b)).

Statement of Facts.

The statement of facts as set forth by Appellant is substantially correct except that the Property Settlement Agreement entered into between the Bankrupt and Appellant referred only to a "drugstore business"; there was no reference whatsoever to "any assets pertaining thereto" as alleged by Appellant in her opening brief (p. 4, first par., line 7).

After the entry of the Order on July 10, 1951, Appellee, by Order of Court, liquidated the assets and now holds in his possession the proceeds therefrom.

ARGUMENT.

I.

No Sale, Transfer or Hypothecation of Personal Property Made by a Person in Possession Is Valid Against Creditors of Said Person Unless It Is Accompanied by Immediate Delivery and Followed by an Actual and Continued Change of Possession, or Unless Said Sale, Transfer or Hypothecation Falls Within the Express Statutory Exemption Contained in California Civil Code, Section 3440.

A. The laws of the State of California provide for the sale or transfer of tangible personal property to be made in accordance with special statutory provisions. The statute specifically covering such transactions is contained in the California Civil Code, Section 3440. This section provides, among other things, that:

> "Every transfer of personal property other than a thing in action . . . is *conclusively* presumed as made by a person having at the time the possession or control of the property, and *not accompanied by an immediate delivery, and followed by an actual and continued change of possession* of the thing transferred, to be fraudulent and, therefore, void against those who are his creditors, while he remains in possession . . ." (Emphasis added.)

This code section contains certain specific exemptions from the provisions of this requirement. It is clear, therefore, that since Bankrupt had full possession and

control of the property, to-wit: The drugstore business involved in these proceedings, and continued to retain complete possession and control after the purported transfer to Appellant, that unless the circumstances of this case warrant that it be included in one of the specific exemptions, the transfer must be conclusively presumed to be void against creditors (and, *ipso facto,* Appellee (Bankruptcy Act., Sec. 70c)) for failure to comply with the provisions of Civil Code, Section 3440.

B. California Civil Code, Section 3440 exempts sales, transfers or assignments of a stock-in-trade, or of fixtures of a retail merchant which are made under any of the following three cases:

> (1) Under the direction or order of a Court of competent jurisdiction;
>
> (2) By an executor, administrator, guardian, receiver or other officer or person acting in the regular and proper discharge of official duty or in the discharge of any trust imposed upon him by law;
>
> (3) Any assignment made for the benefit of creditors or by any assignee acting under such assignment.

This purported transfer of property between Bankrupt and Appellant pursuant to their Property Settlement Agreement, if at all, would be contended to fall within subdivision (1) hereinabove. However, the division of property, being by the private contract between Bankrupt and Appellant (*Hill v. Hill,* 23 Cal. 2d 82, 142 P. 2d 417) did not constitute an order by direction of Court, or judicial sale in any sense.

II.

The Property Settlement Entered Into Between the Bankrupt and Appellant Being a Private Contract Between the Parties Altering Their Property Rights, Did Not Constitute an Order or Sale Under the Direction of a Court of Competent Jurisdiction.

A. The Law Approves and Encourages and Upholds Contracts Between Husband and Wife.

1. The law of California is replete with cases that a husband and wife may contract with each other with respect to property rights (Civ. Code, Secs. 158 and 159; *Hough v. Hough,* 26 Cal. 2d 605, 160 P. 2d 15; *Howarth v. Howarth,* 183 P. 2d 670), and a husband and wife having agreed to an immediate separation or having actually separated, may enter into contracts adjusting their property rights (*Hill v. Hill, supra*), and such property settlement agreement between husband and wife is valid and binding on the Court where it is not tainted by fraud or compulsion, or is not in violation of the confidential relationship of the parties (*Adams v. Adams,* 29 Cal. 621, 177 P. 2d 265; *Norriss v. Norriss,* 50 Cal. App. 2d 726, 123 P. 2d 847; *Kelly v. Kelly,* 129 Cal. App. 325, 18 P. 2d 781; *Baxter v. Baxter,* 3 Cal. App. 2d 676, 40 P. 2d 536; *Robinson v. Robinson,* 94 Cal. App. 2d 802, 211 P. 2d 587). In this case, no claim is asserted that the contract was obtained through fraud or compulsion.

2. In entering property settlement agreements or any other agreements, the husband and wife may change the character of their property. It may be changed from separate to community (*Kenney v. Kenney,* 220 Cal. 134, 31 P. 2d 398); from community to separate (*Thomas*

v. Hoffman, 122 Cal. App. 213, 9 P. 2d 538), and such agreement will transmute their property from one status to another and need not be executed with any particular formality (*Estate of Watkins,* 16 Cal. 2d 793, 108 P. 2d 417; *Siberell v. Siberell,* 214 Cal. 767, 7 P. 2d 1003). And when spouses honestly agree to the disposition of their joint or community property, such disposition is final without regard to whether it is approved by the Court in divorce proceedings. *Such approval is not essential to its efficacy* (*Miranda v. Miranda,* 81 Cal. App. 2d 61, 183 P. 2d 61).

3. In the case before this Court, the Bankrupt and Appellant entered into a Property Settlement Agreement on June 8, 1949, clearly in contemplation of their separation and procurement of a divorce decree, for on the next succeeeding day, June 9, 1949, an interlocutory decree of divorce was entered. In the Property Settlement Agreement between Bankrupt and Appellant, Bankrupt and Appellant said in effect:

> "We now own a drugstore as community property and we will continue to own that drugstore as community property but, in the event of a certain happening, to-wit, an interlocutory decree of divorce being granted to either party, then this division and this change in character will become effective and we will own the drugstore as tenants in common."

In other words, the division of property was made by the agreement itself, but the time for the *effective operation* of said division was the entry of an interlocutory decree. Since there was no allegation, no evidence offered or presented of fraud in the execution of this

Property Settlement Agreement, and since the said Agreement was an honest attempt by Bankrupt and Appellant to divide their property interests, it was a valid agreement and all such are binding on the Court (*Adams v. Adams, supra*).

B. This Property Settlement Agreement Entered Into Between Bankrupt and Appellant Was a Private Contract Between Parties, Was Not Merged With the Divorce Decree, and the Alteration of Property Rights Was Not by Order of Court.

1. All the transfer of property and, specifically, the transmutation of the character of ownership from community to tenancy in common of the drugstore in question, was made by the terms of the Property Settlement Agreement. The decree merely *approved* the Property Settlement Agreement which was not incorporated into the decree. The elements necessary for merger were lacking. If a property settlement agreement is complete in itself and is merely *referred* to in a divorce decree or approved by the Court but not *actually made a part* of the decree, the provisions of such agreement cannot be enforced by contempt proceedings (*Lazar v. Superior Court,* 16 Cal. 2d 617, 107 P. 2d 249). It is necessary that there be an actual *incorporation* of the agreement in the decree in order that the decree standing alone may give within itself the complete measure of the rights and obligations of the parties (*Price v. Price,* 85 Cal. App. 2d 732, 194 P. 2d 101). The very important and leading case of *Hough v. Hough,* 26 Cal. 2d 605, 106 P. 2d 15, holds that the part of the decree which is actually incorporated in the decree (in other words, set forth *haec verba*) is merged in the decree.

2a. The question of merger is not in issue here, nor is it essential to the matter before the Court in these proceedings, for the reason that merger is a question only when prospective matters are sought to be determined by the parties to the agreement or decree. As for example, when enforcement by contempt proceedings is desired (*Lazar v. Superior Court, supra; Price v. Price, supra*); or when modification of the terms for payment of alimony (*Weedon v. Weedon,* 207 P. 2d 78); or child support (*Puckett v. Puckett,* 136 P. 2d 1; *Hough v. Hough, supra; Howarth v. Howarth, supra*) are involved. The question of merger does not relate to the present transfer or division of property at the time of divorce but only to the enforceability of continuing provisions to be performed by one of the parties by the method of a motion before the divorce court rather than by a separate action upon the contract itself.

The case of *Shogren v. Superior Court,* 93 Cal. App. 2d 356, 209 P. 2d 108, reviews the entire history of California law with respect to incorporation or reference of a property settlement agreement as affecting its merger into a decree. This case arose upon a prohibition proceeding to restrain an order to show cause why petitioner should not be held in contempt for failing to make alimony payments.

b. In all cases where the question of merger is involved, it is with respect to the proper remedy to enforce compliance with, or to modify prospective terms included in a property settlement agreement; if there has been merger, contempt proceedings are appropriate (*Lazar v. Superior Court, supra; Shogren v. Superior Court, supra*), or a motion for modification (*Hough v. Hough, supra; Howarth v. Howarth, supra*). If the property settlement

agreement is made a part of the decree by reference only, there is no actual incorporation and even if the decree is recorded, there is no notice to the world of the respective interest of the parties of any property. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree of judgment alone. Since the file did not disclose that the agreement was copied in the decree as an integral part thereof, consequently contempt proceedings are unavailable to assist in its enforcement and resort may be had only to the usual contract remedies (*Price v. Price, supra; Shogren v. Superior Court, supra*).

c. With respect to transfers and settlement of property rights that occur concurrently upon the entry of a divorce decree, the question of merger is entirely irrelevant and when Bankrupt and Appellant have contracted to settle their property rights in existing property and said agreement is free from fraud, it is absolutely binding upon the Court (*Adams v. Adams, supra*). Since in the matter in question in these proceedings Bankrupt and Appellant changed their ownership from community to separate in existing property—the drugstore—by their Agreement, the transfer, if any, was accomplished by their contract and was binding upon the Court.

3a. Actually, although Appellant now contends in this proceeding that the property settlement agreement merged in the decree, this position is inconsistent with her actions in the State Court, for she filed an action against her former husband entitled a "Complaint for Damages"; in effect, an action upon the contract or the Property Settlement Agreement between the parties. There was no attempt to enforce the terms of the decree by an order to show cause why the Bankrupt should not be held in con-

tempt for his purported failure to perform in accordance with the provisions of the Property Settlement Agreement for the payment of monthly sums of money. In other words, the Appellant herself by her action agrees that there was no merger and she pursued the usual contract remedies, a lawsuit for damages for the breach of a contract (*Sanborn v. Sanborn,* 3 Cal. App. 2d 437, 39 P. 2d 830; *Robertson v. Robertson,* 34 Cal. App. 2d 113, 93 P. 2d 175).

b. However, even if it were to be held that the Property Settlement Agreement was merged in the decree, the rights of the parties, if they were intended to be affected by the entry of an interlocutory decree, were decided by the Bankrupt and Appellant between themselves in the Property Settlement Agreement. And since the Property Settlement Agreement was fair and free from fraud (*Robinson v. Robinson, supra*) and since the law approves property settlement agreements and contracts between husband and wife (*Hill v. Hill, supra; Adams v. Adams, supra*), this contract was valid at the time it was entered into; a valid contract does not lose the force of its validity nor do its executed provisions become affected or changed by reason of a subsequent merger—the merger being merely to provide a speedy remedy for the aggrieved party when the other has failed to perform under the provisions of the agreement (*Lazar v. Superior Court; Shogren v. Shogren; Price v. Price, supra*), or to relieve an erroneously burdened party who seeks modification of terms which have become inadequate over the passage of a period of years (*Hough v. Hough, supra*). And if this contract resulted in an effective change in the character of personal property as against creditors and therefore Appellee (Bankruptcy Act, Sec. 70c), it was by private contract, not by Court Order.

C. The Intent of the Legislature in Enacting California Civil Code Section 3440 Was for the Purpose of Permitting Bona Fide Purchasers of the Property and Businesses Enumerated Therein to Take the Same Free and Clear of Creditors' Claims.

1. This section provides that notice shall be given to the world of an intended transfer in order that creditors may be given notice of the change of ownership and take whatever remedies or steps they may deem necessary to insure the payment of the seller's indebtedness. Where property has been held and operated by a person and after the purported transfer of ownership is continued to be held and operated by him without any overt expression or act of change, there is no notice; and creditors may continue to extend credit to the original owner, relying upon the ostensible continued ownership of the person in possession.

2a. Appellant is obviously confused and argues from the point of facts that do not exist, rather than simply from the point of facts that do exist. Appellant argues from the negative and says she was not in possession and transferred an interest to Bankrupt, who was in possession. Actually, we have the situation which resolves itself into the following: Bankrupt was at all times in possession. He was commonly known to all of the creditors as the owner of the property; all licenses were in his name; he had every appearance of ownership. He operated the business; he made purchases; he was in active management of the business; he sold from behind the counter; he signed the checks; he paid the bills; he saw the salesmen of the supply houses. In short, he did everything in acts that an owner does [Tr. p. 34]. At no time was Appellant in charge of or connected with the

active operation of the business, nor was she in possession of the property [Tr. p. 35]. Therefore, the truth is and the case should be argued from the fact that, insofar as creditors are concerned, the Bankrupt in possession was the transferor and Appellant the transferee. No delivery whatsoever was made because Bankrupt, the transferor, remained in possession.

b. It is a *prima facie* fraud on creditors for Appellant to even set up her claim. The whole purpose of Section 3440 of the Civil Code is to avoid fraudulent transfers. If Appellant's contention is to be sustained, it would wreak havoc in the business world. Husband and wife at any time could enter into a contract, even without the necessity of a divorce, and could by the terms of that contract alter their interests in property from community to separate, record the document, and by such means defraud creditors of their just rights by removing from creditors the right to reach the assets of the business which thus apparently would be transmuted into the separate property of the wife. No law could support such action and no Court would sustain such contention, yet that is exactly what Appellant is seeking to do.

c. While the property was community, it was chargeable with all the community debts. Appellant, by claiming that a recorded Property Settlement Agreement takes that property away from creditors who continue to extend credit on ostensible ownership and continued possession by Bankrupt, seeks to accomplish a wrong both legally and morally. Recordation of the Property Settlement Agreement did not constitute notice to creditors, either actual or constructive, for the reason that no creditor is required nor expected to search the records of personal actions between parties to ascertain the exact nature

of the ownership of a going retail business. Notice to creditors is approved by statute. Thus, so far as creditor rights are concerned, the recordation of this document was ineffectual, and since no statutory notice to creditors was given, nor possession changed, creditors were *not* notified.

3a. In the cases which have been exempted by the terms of Section 3440 of the Civil Code from the provisions thereof, it is clear that notice is always given to creditors. All of the transfers or sales provided in said exempt cases are made by or through a Court of equity. In each case, by Order of said Court, *direct and actual notice,* as well as constructive notice by publication, is given to creditors. Therefore, the creditors may take their remedies against the original owner, or his estate, and the buyer in each case is protected. Examples of such transfers would be probate sales, receivership sales and assignee sales. In every case, there is actually notoriety given to the sale and there is creditor knowledge and interest in the transfer. Therefore, a compliance with the provisions of Section 3440 of the Civil Code as they relate to ordinary bulk sales would be surplusage, since the compliance is merely for the purpose of giving notice to the creditors of the seller.

b. This transfer between Bankrupt and Appellant of the property which they had owned in a definite character cannot be construed to be a transfer by Order of a Court of competent jurisdiction for the reason that the orders contemplated in the exemption of Section 3440 of the Civil Code require judicial sales.

c. Some types of judicial sales are, as follows: A sale under a judgment directing the sale of partnership property is a judicial sale where the Commissioner's au-

thority is derived from the judgment which specifically directs what is to be sold and how it is to be sold and no notice of sale need be published or posted (*Publer v. Olds,* 56 Cal. App. 2d 13, 132 P. 2d 236). When a Court having jurisdiction of the subject matter directs property to be sold for the purpose of carrying its judgment into effect, that constitutes a judicial sale and transfer by Order of Court (*Estate of Backesto,* 63 Cal. App. 265, 218 Pac. 597). A sale by an administrator of property of an estate in compliance with Court rules is a judicial sale (*Tracy v. Colby,* 55 Cal. 67).

D. A Divorce Court, Being a Court of Equity, Could Not Order a Transfer of Property in Derogation of Creditors' Rights.

1a. A divorce court is a court of equity and were it to order the transfer of property between husband and wife, it would, before making any such order, inquire into the rights of third parties, bona fide creditors, who might have claims against the parties. A principle of equity will not be applied for the purpose of defeating equity (*Lewis v. Hall,* 38 Cal. App. 329, 176 Pac. 171). Equity requires equality in support of a common burden (*Chipman v. Morrill,* 20 Cal. 130). And since in this case the debts incurred in the operation of the business were common, no court of equity would have transferred to the wife one-half of the drugstore assets free and clear of their burden of the liabilities. If the transfer between Bankrupt and Appellant made by this Property Settlement Agreement were to be held effective as against creditors, it would be an unconscionable miscarriage of justice because there was no notice at the time of the transfer, nor was there any change of possession to give notice or to

give any reason to third parties to inquire as to the facts regarding the change of ownership.

b. In connection with any adjudication of property rights and order of transfer by Court, if the Court were to award any division such as Appellant contends (one-half of all of the assets free and clear of any liabilities at the time of such order), the Court would clearly and necessarily have inquired into the existence and the amount of debts against the business. No evidence was presented or offered to be presented by Appellant to show that there was any such inquiry by the Court. On the contrary, evidence was introduced at the hearing in this case to show that the Agreement was merely approved by the divorce Court.

III.

The Property Settlement Agreement Entered Into Between Bankrupt and Appellant Did Not Create a Trust.

The Property Settlement Agreement was entered into between Bankrupt and Appellant when both parties were represented by counsel; the Agreement represented the result of negotiations had between the parties and their respective counsel (see App. Op. Br. p. 4, Par. 2).

When negotiations have been between adverse parties there is no confidential relationship and by the parties' express agreement it was intended by them that the property be changed in character from community to tenants in common.

Inasmuch as there is no contention here that the community property was mismanaged, it seems clear that the authorities cited by Appellant are not applicable (see App. Op. Br. p. 15B).

IV.

If Appellant Acquired a One-Half Interest as Tenant in Common in the Drugstore Business It Was in the Net Worth.

A. All That Appellant Could Have Acquired Was an Interest in the Net Worth of the Drugstore Business.

1. Even if the Property Settlement Agreement were to be construed most favorably in the light of Appellant's argument that it was completely merged in the decree, that there was never any transfer between Bankrupt and Appellant themselves, and that only the decree may be looked to; that by reason of the fact that the Court approved the Property Settlement Agreement this must be construed to be a transfer by Order of the Court and, therefore, this is to be construed as an exemption within the terms of Civil Code, Section 3440, or that Bankrupt had the duty of discharging a trust and upon that ground the transfer is exempt; or that Appellant out of possession transferred *to* Bankrupt in possession; nevertheless, even consenting for the sake of argument alone, that all of the foregoing is true, all that the Appellant received by this transfer was one-half interest in the net worth of the business.

2. Prior to the entry of an interlocutory decree of divorce, by the terms of the Property Settlement Agreement itself, the parties acknowledged that they held and owned the drugstore business as community property. Thus, Appellant owned an undivided one-half of the net worth of the drugstore (the value of the total assets less

the total liabilities) as community property. It has never been contended that while the property was community it was not liable for the debts incurred in its operation. In fact, it is freely admitted by Appellant that the Bankrupt managed, operated and controlled the business at all times, incurring from time to time indebtedness which was paid from the sales made in the operation of the business [Tr. p. 36, Finding X]. By law, as well as by consent of Appellant, Bankrupt had full management and control. Appellant did not at that time during the marriage own an undivided one-half interest in the assets free and clear of liability. No, she owned an undivided one-half interest in the difference between the total assets and total liabilities. The assets were subject to the liabilities. By the Property Settlement Agreement, this *type* of ownership was transmuted from community to separate property (*Thomas v. Hoffman, supra*). In other words, what Bankrupt and Appellant owned in community they now owned as the separate property of each, with the Appellant granting express consent to Bankrupt to continue full management and control.

3a. Referring back to the words of the Agreement itself, it says:

> "The *drugstore* shall continue to be owned by the parties hereto as community property or, in the event an interlocutory decree of divorce is obtained by either party, then as tenants in common owning an undivided one-half interest." [Property Settlement Agreement, Par. XIV.]

b. What is a drugstore but a going business? A going business has certain assets subject to its liabilities and it may or may not have good will. Therefore, when the parties in their Agreement mentioned the drugstore as such and expressly refrained from enumerating the particular assets which were assets of the drugstore, it is clear that the intent of the parties in dividing was to share a going business and not to divide, for example, one bottle of aspirin to the Bankrupt and one bottle to the Appellant. Such attempted division would clearly be impossible in view of the fact that the drugstore was not being liquidated but it was the express intention of the parties to continue operation and that "the drugstore shall remain under the active management and control of the husband" [Property Settlement Agreement, Par. XIV].

4. If Appellant had been intended to receive one-half of the assets free and clear of liabilities, it is clearly obvious that Bankrupt would not have been able to conduct and continue to manage and operate, nor could he have consented to continue to manage and operate the store. How would he have been able to operate? For example, if he had sold Appellant's bottle of aspirin, how would he have replaced it? If he had bought a new bottle of aspirin to replace the one sold, how would payment have been made for the new bottle? Is it to be held by this Court that Appellant is correct in saying Bankrupt would be obligated to pay the purchase price of the new replacement bottle of aspirin, yet after it was purchased it would become Appellant's because of the fact

that her bottle of aspirin had been sold? The contention of Appellant is so patently absurd as to deny it any serious consideration.

B. The "Net Worth" Could Have Been Transferred Even Though the Term "Net Worth" Itself Is Not Used in the Property Settlement Agreement.

It is not always necessary to "spell out" each word, but the Court may construe the intention of the parties from the sense of an agreement. Appellant wants the Court to read into the Agreement the intention to divide the *assets,* but the term "assets" is not used in the Agreement. The Agreement refers solely to the *drugstore* owned by the parties without reference to individual and specific assets relating thereto. In view of the detailed phrasing in the remaining portions of the Property Settlement Agreement, it must be construed and was construed by the Trial Court, that if the parties had intended the assets to be divided, Appellant would have so particularized them. In the ordinary and common usage, the term "drugstore" relates to a going business. This construction is strengthened by the fact that there is express delegation of authority to Bankrupt for the continuing operation of the business.

V.

An Illegal Contract Is Not Enforceable; It Is Illegal for Any Person to Sell Intoxicating Liquors or Perform Acts of a Licensee Unless Such Person Is Licensed by the State Board of Equalization; Therefore, Appellant Can Assert No Claim to the Alcoholic Beverage License and Stock-In-Trade.

A1. No matter what the intention of the parties may have been to divide and transfer their interest with reference to the Alcoholic Beverage License and the stock of liquor, nevertheless, such attempted transfer was absolutely ineffectual and void as being contra to the clear and definite terms of the California Alcoholic Beverage Control Act (Calif. Const., Article XX). This Act provides that it shall be unlawful for any person other than a licensee of the California State Board of Equalization to sell any intoxicating liquors in this State, and the State Board of Equalization has exclusive power to license as well as to revoke a license for a sale of intoxicating liquor (*Reynolds v. State Board of Equalization,* 29 Adv. Cal. 132). It further provides that no person shall exercise or perform under the authority of a license issued under this Act unless such person is authorized to do so by a license duly issued pursuant to the provisions of Section 3 of this Act, and any person violating the provisions of Section 3 is guilty of a misdemeanor.

2. In order that a person may become a licensee, an application must be made, verified under oath, to the State Board of Equalization; and must contain, among other things, the names and positions of all of the individual parties to the proposed license (State Alcoholic Beverage Control Act, Sec. 10), and no retail license is-

sued by the State Board of Equalization to sell intoxicating liquors shall be subject to transfer unless at least seven days before the filing of the transfer application with the State Board of Equalization the intended transferees shall record in the office of the County Recorder a notice of the intended transfer, stating, among other things, the name and address of the intended transferee (California Alcoholic Beverage Control Act, Section 7.2).

3. This Act is analogous to Civil Code, Section 3440 but does not contain any exemptions as does Section 3440.

B1. Now, although Bankrupt and Appellant intended that the Bankrupt should continue to manage and control and have full possession of the drugstore business, nevertheless, if Appellant's contentions are to be upheld, they intended to divide the retail Alcoholic Beverage License held solely in the name of the Bankrupt and also the stock of liquor. Since there was no compliance with the State Alcoholic Beverage Control Act [Tr. pp. 35-36 Finding VIII], Appellant's contentions could never at any time be upheld, at least with respect to the retail Alcoholic Beverage License and stock-in-trade of liquor, even if she were to be upheld on her contentions with respect to the remaining assets of the drugstore business.

2. There are many cases which have been decided in this State and which uniformly hold that there is no inherent right in any one to engage in liquor traffic and business (*Guzzi v. McAllister,* 21 Cal. App. 276, 131 Pac. 336). And an agreement for transfer of property including a liquor license is only legal when the transfer

of the license is intended to be in accordance with the State Alcoholic Beverage Control Act (*Leboire v. Black,* 84 Cal. App. 2d 260, 190 P. 2d 634).

C. Therefore, since Appellant was never a licensee and made no application for the transfer of the Alcoholic Beverage License to her, to say that she now has an undivided one-half interest in the Alcoholic Beverage License and stock-in-trade of liquor would be to uphold and enforce an illegal contract.

VI.

If Appellant Is a Tenant in Common of the Assets, She Is Liable for the Debts of the Drugstore Business Because Where Express Agency Is Created the Principal Is Liable for the Acts of His Agent Incurred in the Scope of His Authority.

A1. If all of Appellant's contentions were to be upheld and she were adjudicated to be a tenant in common of the assets of the drugstore business, then she is expressly and personally liable for the debts incurred by Bankrupt in the operation of the business from and after the date of entry of the interlocutory decree, June 9, 1949. Paragraph XIV of the Property Settlement Agreement, after reciting that Bankrupt and Appellant own the business as community property and shall upon the entry of an interlocutory decree continue to own the business as tenants in common, continues to state: "The drugstore shall remain under the active management and control of the husband." By this express creation of an agency,

Appellant made herself personally liable for all debts incurred in connection with the management and control and operation of the drugstore business which were incurred by her husband, Bankrupt herein.

2. That which a person does direct through his agent is in law deemed to have been done by himself *(O'Brien v. Leach,* 139 Cal. 222, 72 Pac. 1004). A principal cannot escape responsibility for an act done by his agent in his behalf (*Barr Lumber Company v. Perkins,* 214 Cal. 531, 6 P. 2d 948). In other words, Appellant is directly and personally liable to all creditors for the reason that if she is to be adjudicated a tenant in common of the assets rather than of the net worth of the drugstore business, she is by the same token to be held liable for the debts under the terms of the express agency created by her, naming her husband, the Bankrupt herein, as her agent.

3. The Property Settlement Agreement entered into between Bankrupt and Appellant was recorded in December, 1949. Therefore, if Appellant is contending that this gave notice of the accomplished transfer to the world and present creditors because such arose subsequent to the date of said transfer; nevertheless, she is liable because if she is the owner of the assets, she is the principal and is disclosed as principal of an agent who was instructed to operate and manage the drugstore business. A disclosed principal may be held liable on a contract made solely in the name of the agent (*Bank of America v. Cryer,* 6 Cal. 2d 485, 58 P. 2d 643). And even though an

agent signed his name to a contract as purchaser did not relieve his principal from liability where such agent was acting within the scope of his authority (*Ackerman v. Channel Com. Co.,* 53 Cal. App, 359; 199 Pac. 1101). Therefore, purchases made by Bankrupt must be paid for by Appellant if her contentions are upheld by this Court.

B. There is no quarrel with the authorities cited by Appellant (App. Op. Br., Par. V, p. 34 *et seq.*) relating to liabilities of tenants in common for debts created by their fellow tenants in common; however, it is respectfully submitted that not one of these cases refer to the issue presented before this Court. In not one of the authorities cited by Appellant was there any express agency created by one tenant in common to the other. On the contrary, Appellant herself made the unequivocal qualification in her headnote (Op. Br. p. 34) that a tenant in common is not liable for the debts incurred by a cotenant *in the absence of authority given to the cotenant.* Where there is merely an ownership as tenants in common of a thing, a gratuitous and unauthorized creation of a liability by one of the tenants in common does not impose liability on the other; and since it is clear that such is not the case in these proceedings, there will be no further comment on the matter.

C. By the creation of an express agency, if Appellant is held to be a tenant in common of actual assets rather than net worth, she would have full liability under the laws of agency for all debts incurred by her agent within the scope of his agency.

VII.

It Was Not Necessary to Find a Creditor Was Prejudiced or Misled by Execution of the Property Settlement Agreement or Entry of the Decree of Divorce.

A. It was not necessary to make any express finding that a creditor of the business was misled or prejudiced by the execution of the Property Settlement Agreement or entry of the divorce decree for the reason that there can only be one of two alternative conclusions by this Court, as follows:

1. Either the purported transfer of the property to Appellant as her separate property was void as being in contravention of the express provisions of Civil Code, Section 3440, relating to transfers of personal property; or, if this Court holds that said transfer became effective, then

2. Appellant became the owner of said property and as owner appointed Bankrupt her agent to manage, possess, control and deal with said property.

B. In either of the foregoing, the creditors are protected. If the first conclusion is reached, the transfer being ineffectual, the creditors may resort to the entire proceeds of the assets of the drugstore; and, in the latter, the creditors may proceed directly against Appellant as principal for the entire amount of liability incurred and created in connection with the operation of said drugstore by Bankrupt pursuant to express agency.

Conclusion.

Based upon the foregoing, this Court should affirm the Order of the Referee, as affirmed by the District Court, quieting title in the Trustee in Bankruptcy Appellee herein to that certain drugstore business known as Jerry's Drugstore, 206 North Main Street, Lone Pine, California.

Respectfully submitted,

DOROTHY KENDALL,
Attorney for Appellee.